**Concrete Express of NY, LLC *and* Teamsters & Chauffeurs Local Union 456, IBT, Petitioner.** Case 02–RC–218783

December 10, 2019

ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND EMANUEL

The Employer's request for review of the Regional Director's Corrected Decision on Challenges and Objections and Notice of Hearing raises substantial issues with respect to Employer's objections 4, 5, 6, 7, and 8 that can best be resolved after a hearing. Accordingly, the request for review is granted with respect to objections 4, 5, 6, 7, and 8, and the case is remanded to the Regional Director for consideration of objections 4, 5, 6, 7, and 8, along with the other issues already scheduled for hearing.[1]

Contrary to the argument of our dissenting colleague, the Board is neither overturning an election based on speculation nor is it permitting the Employer to "benefit." The Board is merely remanding the case to the Regional Director to resolve the issues of fact associated with objections 4, 5, 6, 7, and 8. A hearing is necessary to determine whether the alleged conduct occurred, and, if so, whether the Board agent's actions compromised the integrity of the election.[2]

Additionally, these objections do not "stem from a situation of the Employer's own making." In the relevant objections, the Employer alleges that the Board agent failed to secure a potentially determinative challenged ballot in accordance with the Board's Case Handling Manual, and then, while in possession of the unsealed challenged ballot, accepted a ride from the polling location with union officials. If these facts are established at a hearing, they could, in our view, "tend[] to destroy confidence in the Board's election process, or . . . reasonably be interpreted as impugning the election standards . . . ." *Athbro Precision Engineering Corp.*, 166 NLRB 966, 966 (1967). The opportunity for the Employer, later in the day at the Board's regional office, to observe the envelope being sealed and to sign across the flap does not defeat the substantial issue regarding the integrity of the election. Accordingly, we grant review on these objections and remand them for a hearing. In all other respects, the request for review is denied.

Dated, Washington, D.C. December 10, 2019

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John F. Ring, Chairman

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William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

I would deny the Employer's request for review in its entirety. "There is no per se rule that representation elections must be set aside following any procedural irregularity."[3] The Board "requires more than mere speculative harm to overturn an election."[4] It will set aside an election only if the irregularity is serious enough to raise "a reasonable doubt as to the fairness and validity of the election"; perfect compliance with the Board's election procedures is not required.[5]

Applying these standards, the Employer's objections 4, 5, 6, 7, and 8 are speculative, at best, and further they stem from a situation of the Employer's own making, which it should not be permitted to benefit from now. These objections flow from a single event: the fact that the Board agent did not immediately seal the cover envelope containing the challenged ballot envelope and did not have the observers sign the cover envelope. However, as soon as the Region recognized the error, it promptly asked both parties to come to the Regional Office for the sealing of the cover envelope containing the challenged ballot—which was itself already in a sealed envelope. The Employer's legal counsel chose to decline the invitation. The Petitioner's legal counsel and the Board agent sealed the cover envelope and signed it.

[1] The Regional Director has directed for hearing the Petitioner's challenge to Rafael Valencia's ballot, Petitioner's objections 1, 3, and 4, and an allegation not raised by either party regarding potential Employer interrogation. These issues have been consolidated for hearing with certain unfair labor practice allegations.

[2] Specifically, a hearing would allow the Employer to present its witnesses and would also give the Petitioner an opportunity to respond to the allegations.

[3] *St. Vincent Hospital*, 344 NLRB 586, 587 (2005).

[4] *J.C. Brock Corp.*, 318 NLRB 403, 404 (1995).

[5] *Polymers, Inc.*, 174 NLRB 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970) ("While the manner in which the ballot box could have been sealed could have been improved upon . . . [and] although the Board agent did not retain personal physical custody of the sealed box and the blank ballots at all times, the security afforded these items was such that there was only the remotest possibility that anything untoward occurred.")

The Employer now speculates as to a list of possible harms that could have come from the fact that the challenged ballot in the sealed envelope was not immediately placed in the cover envelope. But the Employer has not offered any facts to support its speculation, and there is no basis to believe it would establish sufficient supporting facts at a hearing. Moreover, the Employer chose not to attend the cover sealing when invited to do so. It should not now be allowed to use that absence to create a chain of objections without supporting evidence.[6] There is no actual evidence of tampering or fraud and the challenged ballot was already in a sealed envelope, albeit not the cover envelope. Nor, contrary to the majority's argument, does the fact that the Board agent accepted a ride from the polling location with the Union's representatives indicate that the Board agent tampered with the ballot or otherwise favored either the Union or the Employer.[7]

Because the Employer's request raises no substantial issues warranting review, it should be denied.

Dated, Washington, D.C. December 10, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

[6] *Farrell-Cheek Steel Co*., 115 NLRB 926, 928 (1956) (in the absence of specific evidence of actual fraud, speculation of the opportunity for fraud by chain voting was not enough to set aside the election). See also *Parkview Community Hospital*, 2015 WL 413882, fn. 3 (2015) (noting employer failed to meet its burden of proof regarding alleged fraud).

[7] See *Rheem Mfg. Co.* 309 NLRB 459, 462 (1992) (Board agent walking through the plant with the union representatives did not warrant setting aside the election); *Securitas Security Services*, 2014 WL 534920, fn. 1 (2014) (Board agent talking and laughing with two union representatives while the representatives were distributing possible pro-union literature was not enough to show objectionable fraternization). See also *NLRB v. Michigan Rubber Products*, 738 F.2d 111 (6th Cir. 1984), enfg. 251 NLRB 74 (1980) (Board agent allowing the union's representative to carry the voting booth to the agent's car while the agent carried the ballot box and election kit was imprudent but did not give the appearance of fraternization and could not have affected the outcome of the election; the incident was based on "practical, physical logistics.")